No. 12,594

IN THE

United States Court of Appeals

For the Ninth Circuit

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER and SANDERSON & PORTER, a Partnership,

(Defendants) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

(Intervenors) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Defendants-Appellants' Reply Brief

Upon Appeal from the District Court of the United States for the District of Arizona.

FILED

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Upon Appeal from the District Court of the United States for the District of Arizona.

LIABILITY OF DEFENDANTS-APPELLANTS AS CO-EMPLOYEES

At all times since the inception of this case in the Arizona Superior Court the complaint has been founded on the charge of negligence by the defendants-appellants as independent con-

tractors. No effort was made below to amend the complaint to charge, in the alternative or otherwise, liability on the part of the defendants-appellants as co-employees of the appellee, John E. Hubbell.

Now, primary reliance by appellees is placed on that contention.

Appellees' counsel make no effort to enlighten Court or counsel on the duty defendants-appellants as appellee John E. Hubbell's co-employee owed him and merely assume that the issues in an action of that sort are identical with those in this action against them as independent contractors. The relations are so dissimilar that it would seem that appellees should have endeavored to carry the burden in this argument.

The earlier cases were very clear to the effect that an employee's liability to a co-employee or a third person is limited to acts of misfeasance, negligence resulting from mere nonfeasance, being non-actionable. Perhaps the leading case in the country is *Murray v. Usher,* 117 N.Y. 542, 23 N.E. 564.

Also see *N. O. & T. P. Railroad Co. v. Robertson,* 115 Ky. 858, 74 S.W. 1061; 52 A.L.R. 1401 at 1405, 6.

This principle has been applied by the Federal Courts in removal matters—*Knight v. Atl. Coast L. Rd. Co.,* 73 F(2)76(C5), 99 A.L.R. 405, and by an Arizona District Court (Judge Sames) in *Donaldson v. Tucson Gas E. L. & P. Co.,* 14 F.S. 246.

It is true that some of the later state cases reject distinctions between misfeasance and nonfeasance but there is a line of very respectable authority which still enforces the distinction. 2 *Am. Jur. Agency,* Section 325, Page 255.

There is no decision in Arizona and just what the Arizona Courts will hold is a matter of conjecture. If they apply the rule above mentioned, so very ably stated in all of the above authorities, no one could reasonably contend that the jury found against defendants-appellants, that is, found that these defendants-appellants were guilty of misfeasance toward the appellee, John E. Hubbell.

The complaint alleges both misfeasance and nonfeasance on the part of these defendants-appellants. The charge to the jury made no point of the matter. The Court charged that negligence might be either affirmative or negative, misfeasance or nonfeasance. The jury might have acquitted the defendants-appellants of misfeasance and convicted them of nonfeasance.

Even if this Court should hold that the defendants-appellants were liable to the appellee, John E. Hubbell, if he was injured by any form of negligence, misfeasance or nonfeasance on their part, still they were entitled to have the issue submitted to the jury, it being in any event different from the issues raised by the pleadings.

It is respectfully submitted that these defendants-appellants, who personally had nothing to do with the accident, could be held liable only for some breach of duty they owed to the appellee, John E. Hubbell. Liability by virtue of respondeat superior is out of this feature of the case. *Res. Agency,* Section 358 (1).

Any right on the part of the appellees to hold Robert Gibson, foreman, or Harold Fields, guard, for negligence doesn't impose liability on these defendants-appellants.

Defendants-appellants of course owed said appellee the duty to exercise due care to employ competent and prudent men to carry out the work and protect persons lawfully on the premises from harm. There is no charge of failure in this regard.

Analagous cases would seem to be those bearing on the liability of a supervising agent or employee to co-employees. 13 *Am. Jur.,* Page 1024.

We will now discuss appellees' brief under the headings used by them.

PART I

Section A of Appellees' Brief, The Constitutional Question

(Appellees' Brief, Page 8)

Counsel contend that Section 56-949 violates Article XVIII, Section 6, of the Arizona Constitution. This Court no doubt has the power in this case to declare acts of the Arizona Legislature violative of the Arizona Constitution, but it is submitted that it

is an exercise of power by the Federal Courts that should be sparingly used where a statute, such as this one, has been in the Arizona Code for twenty-five years.

Counsel rely on the case of *Alabams Freight Co. v. Hunt,* 29 Ariz. 419, 242 Pac. 658.

This case holds in effect that the Arizona Constitution guarantees common law rights of action for damages and that the Legislature may not destroy them. These common law rights are said to be constitutionally approved. The Court, nevertheless, holds that a legislative act which forces one to an election either to retain such common law rights of action or accept the benefits of a Workmen's Compensation Act does not infringe his constitutional rights and that such act is consequently within the power of the Legislature.

An act of that sort doesn't destroy any rights. Those rights are fully preserved. It merely offers the claimant the option of substituting therefor another remedy. If the opportunity of choice is reasonable and fair and the claimant under no compulsion to choose the alternative remedy, his voluntary course of action is not disturbed and he has no ground for complaint.

The contention of appellees that the election offered by the Legislature must be a choice of remedies against the same tort feasor—in this case co-employees—finds no basis in reason. We are here dealing with Workmen's Compensation laws, behind which is the policy of the State that industry pay for the injuries of its employees. The employee has his common law cause of action against a co-employee. He may retain it if he wishes. The act puts him to a reasonable election between the assertion of such cause of action or a claim to compensation benefits under the Workmen's Compensation law. It is not material as a practical matter or on principle that his elective right is against the industry rather than against the employee.

We see no point in discussing the case of *McClellan v. Auto Insurance Co.,* 80 F.(2) 344, (C.C.A. 9), as it bears on this

matter only because of its quotation from the Alabams case. The factual situations are entirely different.

We think *Moseley v. Lily Ice Cream Company,* 38 Ariz. 417, 300 Pac. 958, is in point. The constitutionality of Section 56-949 was challenged on the same basis as the challenge in this case. The Court denied this contention because, as it held, the claimant was given a reasonable election either to hold the third party at common law or to hold the employer under the Act.

Kress & Company v. Superior Court, infra, sustains view that the section in question is valid. See discussion infra.

Appellees' counsel get some comfort from the New York case, *Judson v. Fielding,* 237 N.Y.S. 348, but we fail to see where it is applicable to this point. See later discussion of this case.

Section B. Interpretation of Words "In the Same Employ"

(Appellees' Brief, Page 20)

It is next contended that the failure of the employee to reject the Act (thus bringing him under the terms thereof) does not affect his right of action to damages against his co-employee. The effect of appellees' arguments is that the injured co-employee may accept the benefits of the Workmen's Compensation law and also hold his fellow employee in damages, and that he is not put to an election until after his injury.

But such an argument, it seems to us, defeats itself. If the employee, concededly bound by the Workmen's Compensation Act, nevertheless retains the right to sue his co-employee for negligence, to what purpose then does the statute force him to election at the very moment of the enjoyment of his dual rights?

The more reasonable interpretation of these statutes is, we submit, that the Constitution and the Legislature intended to create a right to compensation which, if accepted by the employee, was in lieu of any causes of action that he might have either against his employer or against "any of his or its agents, or employee or employees." Article XVIII, Section 8.

Strangely enough, there is no decision in Arizona which discusses this specific point but it was raised on the record in the

case of *Kress & Company v. Superior Court,* 66 Ariz. 67, 182 Pac. 931.

In that case the employee by his guardian brought an action at law against his employer and co-employee, Clarence L. Wise, assistant manager of the employer. The defendants, both of them, filed in the Supreme Court of Arizona an original proceeding for a writ of prohibition on the ground that the plaintiff was an employee covered by the compensation policy of the defendant company and consequently had elected to take the benefits of the compensation act and was, therefore, in no position to bring an action at law against either defendant. This position was sustained by the Supreme Court as to both defendants.

True enough, there is no discussion in the case of the right of the plaintiff to sue his co-employee but it is scarcely to be believed that the Arizona Supreme Court on an original hearing of that kind, involving a question of such great importance to the people of Arizona, would overlook the fact that one of the defendants was a co-employee of the plaintiff. If the appellees are correct in this case the Court would have been compelled to deny the writ of prohibition in so far as the co-employee, Wise, was concerned, although granting it as to the employer.

We submit that under the doctrine of *Erie R. Co. v. Tompkins,* 302 U.S. 671, 82 L.Ed. 1188, 114 A.L.R. 1487, this Court should consider that the law is established in Arizona that an employee covered by his employer's compensation policy cannot sue a co-employee for negligence.

The trial judge was from another jurisdiction and certainly in no position to establish an abstract rule of law for Arizona—as a matter of fact, less so than the Industrial Commission, with its quasi judicial power to hear and act, under constant exercise. (And that the Commission was and is acting honestly and conscientiously in the belief and holding that appellees have no claim against defendants-appellants and should have remained and now be placed on the compensation payrolls of the Commission, we do not believe any fair minded person will challenge—whatever may be in the minds of appellees' counsel. (Appellees' Brief 73).)

Appellees' counsel cite cases from other jurisdictions. We believe they throw little light on the subject, so considerable are the differences in constitutional and statutory provisions, apparently under frequent amendment. The New York case of *Judson v. Fielding,* 277 App. Div. 430, 237 N.Y.S. 348, affirmed in a memo opinion in 253 N.Y. 596, 171 N.E. 798, is most heavily relied on.

While the New York statute at the time the Judson case arose was quite similar to our 56-949, it may not be disembodied from the statutory structure of New York, consisting of its constitution and laws, and considered in the abstract, nor is it possible thoroughly to appreciate its force without careful study of the earlier controlling New York decisions—a task unduly burdensome.

We do know, however, that it apparently was unfavorably received in New York as the Legislature shortly thereafter amended the law to prevent one employee from suing his fellow employee. This is revealed by the following quotation:

> "The legislative history of subdivision 6 shows it has no application to an action brought by an injured employee, or, in case of death, by his dependents, against a third party. That subdivision in its present language, but without separate numbering, became part of the Workmen's Compensation Law by an amendment to Section 29, L. 1934, ch. 695. It was enacted following the decision in *Judson v. Fielding,* 277 App. Div. 430, 435, 237 N.Y.S. 348, 354, 355, affirmed 253 N.Y. 596, 171 N.E. 798. In that case, construing the statute as it read prior to its amendment in 1934, the court said: 'We find no intent or purpose in the statute to absolve any but the employer from liability in a civil action for damages caused by his own wrong.' Therefore, the court held the statute did not bar one co-employee from suing another for damages resulting from a negligent act occurring in the course of their common employment.
>
> "Assuming, as we may, that the lawmakers were cognizant of the statute as it then existed and the construction of it by the courts, it is clear that in enacting subdivision 6, the Legislature intended to abrogate the rule announced in the Judson case." (Cases cited.) *Caulfield v. Elmhurst Contracting Co.,* 268 App. Div. 261, 53 N.Y.S. (2) 25.

It might perhaps be appropriately said that if the Judson case should carry weight because of similarity of New York statutes to our own, so also should cases from Oklahoma and Oregon, grouped by our Supreme Court with New York cases. Cases from these three jurisdictions are also grouped for discussion in 71 C.J. 1530. It will be noted that the rule in Oklahoma and Oregon is disclosed to be contrary to that of the Judson case. Also in note 79, page 1531, the author appears to conclude there is some contrariety of view in New York on the question.

The text is:

> "Under a provision permitting, under certain circumstances, an injured employee to bring an action against another not in the same employ, such an action may be maintained when, and only when, such other is not in the same employ, but there is authority for the view that such a provision does not prevent an action at law against a co-employee."

The cases cited in support of the affirmative statement are from Oregon and Oklahoma, while those cited for the final qualifying clause are from New York.

Statutes preserving rights against "third persons" (Missouri-applied in 94 F.(2) 132), "third parties" (Wisconsin), "person other than the employer" (California, North Carolina, Connecticut and Louisiana), (see cases cited by appellees, pages 22, 59, 25) are not as sweeping as those of Arizona, Oklahoma and Oregon where the language is "not in the same employ." If defendants-appellants were co-employees of appellee, John E. Hubbell, they would appear to be in the same employ.

Section C. The Independent Contractor Question—Generally (Appellees' Brief, Page 26)

The appellees in their complaint allege that defendants-appellants were independent contractors and it would appear that the burden of proof is on them to establish that allegation. It is true that the word "agent" has a wide connotation but it doesn't seem to be particularly helpful to engage in an abstract discus-

sion of its meaning. Our Arizona statutes and court decisions have, we think, defined as clearly as is usually found, the distinction between an independent contractor and an employee. No one argues that because an independent contractorship has some of the elements of an agency relation, an independent contractor, is not within the scope of the phrase "not in the same employ," in Section 56-949. The terminology used in our opening brief appears to meet appellees' views.

Section D. Independent Contractor—Right of Control

(Appellees' Brief, Page 32)

We do not quarrel with the proposition of law that the right of control over the means and methods of doing the work is determinative of the question of independent contractorship nor with the reasoning and conclusion of this Court in *Hearst Publications v. N. L. R. B.*, 136 F.(2) 608, (reversed for reasons not important here in *N. L. R. B. v. Hearst Publications*, 322 U.S. 111, 88 L.Ed. 1170, 64 S.C. 851) nor with the abstract correctness or Restatement of Agency, Section 220. (Although it doesn't establish any satisfactory rule of thumb for all cases in the view of the Supreme Court in the case cited above—note 19—and recognizes the limitations of Workmen's Compensation laws, Sections 491 and 528.)

Section E. Determination of Agency Question, Functions of Court and Jury

(Appellees' Brief, Page 34)

We agree that the rules laid down in 56 C.J.S. 92 (Master and Servant, Section 13) in these words:

> "As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one of fact for the determination of the jury; otherwise the question is one of law for the court."

are sound. Our views on this matter are set forth in our opening brief, pages 25 to 27 and on page 35.

FRAUD

(Appellees' Brief, Page 36)

The argument apparently is that while the contract ("cleverly and adroitly drawn," page 38) probably precludes a relationship of employer-independent contractor and commits the parties to an employer-employee relationship, defendants-appellants ought not to be allowed to rely on that effect of the contract because "yet it must be apparent that this contract was drawn in anticipation of just such a contingency as gave rise to this law suit." This is followed by the rather inflammatory remark "Such a contract gives Sanderson & Porter liberty to go about the nation contracting huge construction jobs, and injuring such workers as this plaintiff with impunity."

It is a gratuitous and baseless charge (repeated elsewhere in this brief, instances being on pages 43, 44). Appellees' counsel are hard put to it when they ask this Court to impute to defendants-appellants the mean and contemptible purpose of preventing employees of the latter company from recovering against the former.

Cases may be found where an obvious effort was made to prevent an employee from having from his employer the benefits of the Workmen's Compensation Law, as when a pretense is verbally made that a relation of employer-independent contractor is created, it being obvious, however, that the so-called independent contractor is a mere servant.

See *Industrial Commission v. Weddock,* 65 Ariz. 324, 180 Pac. (2) 580.

(But see *S. W. Mills v. Ind. Com.,* 60 Ariz. 199, 134 Pac. (2) 162, where such a relation was sustained against the charge of fraud with unhappy result to injured employee.) That is the statement in 56 C.J.S., Page 48, which appellees quote on page 37 of their brief.

But no case or authority can be cited which holds that parties such as are before this Court are powerless to make a contract whereby the relationship of employer-employee is voluntarily assumed.

It is obvious from the contract the parties thereto did create a relation of employer-employee. This was done with no evil purpose in mind—toward men employed by Tucson Company, or anyone else, but in the exercise of their right as free men to assume such relationship toward that company, as they and it deemed satisfactory.

Not only do appellees charge us with fraud—they find us guilty, too. That "issue" also, we assume they consider, was not for the jury.

Section F. The Contract Construed

(Appellees' Brief, Page 38)

Several provisions of the contract are picked out as inconsistent with an employee relationship but they are no more than a statement of the services to be rendered. The provision that the project will be turned over to the employer is not inconsistent with the full right of supervision granted at the outset of the contract.

Section G. The Contract—Right of Termination

(Appellees' Brief, Page 41)

Argument is made that this right is trivial and uncompelling because (a) the contract was not terminated and (b) the Tucson Company did not have the men or know how to complete the job.

As to (a): It is the right to terminate that is relevant;

As to (b): One's inability to complete a contract in the future would not appear to be relevant on the question of the immediate relationship.

And the assumption of facts—inability to complete—is not supported by the record. No reason appears why the Tucson Company could not have installed these generators. See testimony of Mr. Saunders at 133, Mr. Snider at 130 and Mr. Lovell at 117.

Section H. The Contract—Similar Instruments Construed

(Appellees' Brief, Page 44)

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Section H. The Contract—Similar Instruments Construed

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the Arizona statutes and decisions a conclusion should be reached. It but confuses to consider the innumerable authorities on the subject.

On page 48 counsel say of *Southwest Lumber Mills v. Industrial Commission,* 60 Ariz. 199, 134 Pac. (2) 162:

> "The contract gave the company broad powers over the contractor. It could terminate the contract immediately without notice; the contract could not be assigned, etc.".

Compare this with the quotation from this case on pages 23 and 24 of our opening brief.

We will not review their discussion of the cases cited by appellants but would like to call the Court's attention to the following languages from *Industrial Commission v. Weddock,* 65 Ariz. 324, 180 Pac. (2) 580:

> "We cannot conceive of an independent contractor subject to being summarily, or within a period of twenty-four hours, dismissed without liability as the contract states, and yet not be under the order and control of another party."

The point is suggested on page 50 of appellees' brief that the installation of these generators on the Company's own property and as a part of its going system was no part of its trade or business. This would mean that a utility must let an independent contract for the installation of new facilities whether it cares to do so or not. It would appear clear that the construction of a plant the employer intends to operate is a part or process in its business or trade within the meaning of Section 56-928. Attention is called to the express inclusion in the Articles of the Tucson Company of the right to erect its own plant, etc.—if, indeed, express authority was necessary. (Tr. 188.) And we might in passing note that Mr. Hubbell's work for the Company was the stringing of wires on a new line of poles the Company had placed for the purpose of connecting up with the new plant.

Section I. The Restatement and Surrounding Circumstances

(Appellees' Brief, Page 52)

While we believe the Arizona statutes and cases furnish enough law for a decision in this case, and consequently Restatement Section 220 cannot be considered as controlling, (see also our comment supra under Section D), nevertheless, the principles laid down appear to be no more than a codification of the law as generally applied by the courts in diverse situations.

The nine criteria are not like a nine-round prize fight where the winner of a majority of the rounds on points takes the money. The effort to divide the test into nine compartments is praiseworthy and helpful but affords no final formula. If in answer to criterion i it is determined that the control is so great an employer-employee relationship was created, all the rest fade into insignificance.

This point i is discussed most thoroughly in other parts of appellees' brief and our own and we believe that any further discussion of ii, iii, iv (all related) would also be repetition. V was answered specifically by Mr Broockmann who testified "Sanderson & Porter did not bring any tools or equipment for this job" (138, last line). The so-called office building was on the Tucson Company's property and belonged to it. Under vi the point is made that Sanderson & Porter carried their own compensation insurance and Mr. Broockmann explained why (140). Vii concerns the method of payment which in this case is in no wise inconsistent with the employer-employee relation. Viii is the point elsewhere discussed—whether the work was part of the trade or business of Tucson Company.

As to ix:

> "Whether or not the parties believe they are creating the relationship of master and servant."

This is new. There was considerable evidence on this score. All, we submit, to the effect that the parties did not intend to create an employer-independent contractor relationship. To the contrary, the intention was definite and, we submit, undisputed,

that there should be the relation of employer-employee. See testimony of Saunders, president of local company (129-130), and Broockmann, representative of defendants-appellants, (137).

Section J. Substantial Agreement of All Witnesses as to Facts of Relationship

(Appellees' Brief, Page 63)

Our position, which counsel profess to find confusing, is that the contract in this case necessarily governs unless the appellees were able to show that it was conceived in fraud or that in actual practice was so far abandoned as to create a relation of employer-independent contractor. We do not believe they succeeded sufficiently to carry the case to the jury, but in any event they surely did not succeed to the point where the lower court was justified in removing the issue from the jury's consideration on the theory that there was no substantial evidence to sustain defendants-appellants' position.

One very serious issue of fact would be whether the parties acted in good faith in drafting the contract in the terms employed or whether there was an intention to hide the real relationship of the parties thereto. This would invoke determination of the actual intention of the parties when the contract was signed as to the true relationship to be created. There would also be the issue whether there was any intention in the performance of the work to convert the relationship from employee to independent contractor. These would be issues of fact for submission to the jury—not the numerous details set up by counsel on pages 64 and 65, all matters of evidence, important only as they might bear on the issues. And these issues involve intention, a matter peculiarly within the jury's province.

Section K. Summation—The Independent Contractor Question

(Appellees' Brief, Page 67)

There is nothing new here except the suggestion that if Sanderson & Porter can become employees, so also may United States Steel and General Motors. No doubt they frequently do if, as

we presume is not improbable, they undertake to make installations for clients who insist on complete supervision and control. Surely many corporations do act in that capacity. Any holding that all corporations, willy nilly, are independent contractors would leave their employees without compensation protection, if, as too often happens, they are not insured under the Act and not able (or successfully unwilling) to take care of an injured employee. We might add that Sanderson & Porter is a partnership of individuals.

PART II

Section A. The Election Question

(Appellees' Brief, Page 69)

We do not comprehend the argument on pages 79 and 80—although it may be our density. We confess we did not and do not believe that 56-949 and 56-950 are totally inconsistent. See also appellees' brief, page 17.

Undeniably the case of *Johnsen v. American Haw. S. S. Co.,* 98 F.(2) 847, has points of resemblance to our case. It, nevertheless, did not involve an Arizona statute or Arizona law and the rule of the decision (if not influenced by the fraud element) would, we believe, in effect overrule the principle so clearly recognized in *Weaver v. Martori,* 69 Ariz. 45, 208 Pac. (2) 652, and be a disturbing influence in the administration of our compensation law.

It is not likely our Courts will depart from the view that an injured employee, by bringing his action against a third party, makes a binding election whether he knew he was by statute put to a choice or not; nor, confirming that holding, at the same time accept the view of this Court, if so be the decision, that an employee may take compensation indefinitely as long as he does not know the law requires him to make a choice, repudiate his earlier choice when he does learn the legal situation and sue the third party for damages. As between the two situations, the equities would appear to be greater in favor of the former, who will lose all if he fails in his common law action. The employee

who accepts compensation and then changes his position has nothing to lose for if he fails to prevail against the third party or his recovery is inadequate, he may then return to the Commission compensation rolls for the difference between full compensation benefits and his recovery on his negligence action, 56-949—a position the appellees in this case enjoy.

How may the Arizona Courts accept the doctrine that the right to sue a third party cannot be lost by the employee's acceptance of compensation from his employer, no matter how long, until he learns the law requires him to make a choice between the two remedies, and at the same time enforce the inflexible Arizona rule, in effect ever since *Consolidated Arizona Co. v. Ujak,* 15 Ariz. 382, 139 Pac. 465, that an employee's election to accept compensation or his institution of a suit is absolutely final and binding so far as his employer is concerned? Nothing short of an equitable ground of relief is sufficient to justify the employee in changing his remedy against his employer. See cases cited on page 31 of our opening brief.

If we understand the principle of *Erie Rd. Co. v. Tomkins,* supra, correctly, this Court should apply to this case the rule it believes would be applied by the Arizona Courts, if the matter were before them. Whether that rule seems harsh (although in this case it clearly cannot work any hardship on the appellees, since the benefits under the Arizona Compensation Law are liberal and may in the end be more beneficial to appellees than a lump sum of fifty thousand dollars, less expenses, the lien of the Commission and, we believe it not unfair to add, attorneys' fees) or less equitable or reasonable than the rule of the Johnsen case is beside the point—although much may be said in defense of the Arizona rule, and some federal courts differed from this Court's holding in the Johnsen case.

We had thought appellees' counsel were relying on the dicta in *Moseley v. Lily Ice Cream Company,* 38 Ariz. 417, 300 Pac. 958, in support of their contentions in this connection (see our opening brief, pages 32 to 34) but apparently they accord it little weight. See pages 70 and 71 of appellees' brief. Needless to say, we agree that it has no controlling force.

Section B. The Jury Question

(Appellees' Brief, Page 82)

Even if the principle of the Johnsen case is applied here, the acceptance by appellee of compensation benefits would prevent this action if he then knew he was compelled to make a choice of remedies.

This was an issue of fact raised by the pleadings and the burden of proof was on appellees to show his ignorance of the law.

The question was the state of appellee's mind. Disproof of his sworn testimony may be—nearly always is—difficult.

On the evidence before it, the jury could reasonably have found that appellee was mistaken or not telling the truth. His credibility was definitely to be determined.

Without trying to exhaust the record, a reasonable argument could have been made to the jurors that applying their experience as people of the community Mr. Hubbell, a man of considerable intelligence, once a foreman on a railroad with ten men at times under him, for some time in the employ of a business of hazardous nature, must have realized in the long period after drugs were discontinued, when he was signing compensation claims, conversing with others, considering his rights against Sanderson & Porter and to compensation, that he was bound to make a choice between remedies. Once it was the law that all persons were presumed to know the law. If that is now in the discard, have we gone to the other extreme—is it now the law that one's sworn, uncorroborated (with corroboration at hand) statement that he did not know the law must be accepted in the absence of directly contradicting evidence? Is it not sufficiently probable that Mr. Hubbell was advised of a law on our Arizona statutes for many years—a law which certainly ought to be universally known among those primarily benefited thereby—to carry the case to the jury?

There are cases holding that the unimpeached testimony of disinterested witnesses may not be disregarded, (a rule that

ought to be applied with extreme caution) and some courts would extend the principle to parties themselves; but the general rule for the Federal Courts would appear to be that stated in *Sonnentheil v. Christian Moerlein Brewing Co.,* 172 U.S. 401, 43 L.Ed. 492, 19 S.Ct. 233, that the mere fact that the witness is interested in the result of the suit is sufficient to require the credibility of his testimony on any issue of fact to be submitted to the jury although his testimony is uncontradicted.

See discussion and review of cases in *Sartor v. Arkansas Gas Co.,* 321 U.S. 620, 88 L.Ed. 967, 64 Sup. Ct. 77.

The Arizona rule was stated in terms equally as sweeping as those used by the United States Supreme Court in *Davis v. Ind. Com.,* 46 Ariz. 169, 49 Pac. (2) 394.

No doubt there are a few exceptions to this general rule but it is submitted this case does not fall within them, concerning as it does a question of mental processes.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and judgment ordered that appellee, John E. Hubbell, be restored to the compensation payrolls of the intervenors, The Industrial Commission of Arizona, or that a new trial be granted.

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